RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
DEC 10 1998
CLERK

No. 98-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E. K. MC DANIEL, Warden, Ely (Nevada) State Prison, and
FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada

DAVID F. SARNOWSKI*
Chief Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3538

Counsel of Respondents
* Attorney of Record

RECEIVED
DEC 14 1998
OFFICE OE THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

I. OPINIONS AND JUDGMENTS BELOW. 1

II. JURISDICTIONAL STATEMENT 2

III. STATEMENT OF THE CASE 2

IV. REASONS FOR DENYING THE WRIT 6

A. INTRODUCTION. 6

B. THIS COURT SHOULD NOT GRANT THE PETITION, VACATE THE JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS BECAUSE *STEWART V. MARTINEZ-VILLAREAL*, 118 S.CT. 1618 (1998), DOES NOT APPLY TO THE FACTS OF THIS CASE. 7

C. THERE IS NO SPLIT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING WHETHER THE PROVISIONS OF RULE 9(B) GOVERNING "SECOND OR SUCCESSIVE" PETITIONS APPLIES WHEN THE PRIOR PETITION WAS NOT DETERMINED ON THE MERITS. 8

V. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Benton v. Washington,
106 F.3d 162 (7th Cir. 1996) 9

Camarano v. Irvin,
98 F.3d 44 (2nd Cir. 1996) 9

Christy v. Horn,
115 F.3d 201 (3rd Cir. 1997) 9

Dellenbach v. Hanks,
76 F.3d 820 (7th Cir. 1996) 9

Dickinson v. Maine,
101 F.3d 791 (1st Cir. 1996) 9

Farmer v. McDanie,
98 F.3d 1548 (9th Cir. 1996) 7, 8

Ford v. Wainwright,
477 U.S. 399 (1986) 7

Hill v. Lockhart,
894 F.2d 1009 (8th Cir. 1990) 9

In re Gasery,
116 F.3d 1051 (5th Cir. 1997) 9

In re Turner,
101 F.3d 1323 (9th Cir. 1997) 9

In re Wilson,
142 F.3d 939 (6th Cir. 1998) 9

Lawrence v. Chater,
516 U.S. 163, 167 (1996) 7

McCleskey v. Zant,
499 U.S. 467 (1991) 7

TABLE OF AUTHORITIES CONT. . .

McWilliams v. State of Colorado,
121 F.3d 573 (10th Cir. 1997) 9

Rose v. Lundy,
455 U.S. 509 (1982) 5

Stewart v. Martinez-Villareal,
118 S.Ct. 1618 (1998) 6, 7, 8

Woods v. Whitley,
933 F.3d 321 (5th Cir. 1991) 9

OTHER AUTHORITIES

28 U.S.C. §1254 2

28 U.S.C. §2254 ..... 2, 4, 9

28 U.S.C.§2244 (Supp. 1997) 7, 9

Rule 9(b) of the Rules Governing §2254 ..... 5, 6, 8, 9

No. 98-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E. K. MC DANIEL, Warden, Ely (Nevada) State Prison, and
FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COME NOW, Respondents E.K. McDANIEL, Warden; and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and file this brief in opposition to the petition for a writ of certiorari submitted by Antonio TonTon Slack (Slack).

I.

OPINIONS AND JUDGMENTS BELOW.

The Opinion of the Federal District Court for the District of Nevada was filed March 31, 1998. (App. 1.)[1] The Order of the United States Court of Appeals for the Ninth Circuit was filed on July 7, 1998. (App. 2.)

. . .

. . .

[1] All references to an appendix are to the appendix submitted with Mr. Slack's Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

28 U.S.C. §1254 confers jurisdiction upon this Court to review the order of the United States Court of Appeals for the Ninth Circuit denying Slack's request for a certificate of probable cause to appeal.

III.

STATEMENT OF THE CASE

In 1990, a Nevada jury convicted Petitioner Slack of second degree murder with the use of a deadly weapon. Slack was sentenced to life with the possibility of parole for the murder. That sentence was enhanced with a consecutive sentence of life with the possibility of parole for the use of a deadly weapon during the commission of the crime. (App. 3.) Slack appealed his conviction to the Nevada Supreme Court and raised the following issues: there was insufficient evidence adduced at his trial to convict him; the trial court improperly allowed evidence of a sexual relationship between Slack and his twelve-year-old victim; the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada constitutions; and the trial court erred by not adequately defining premeditation in the jury instructions. The Nevada Supreme Court dismissed Slack's appeal. (App. 4.)

On November 27, 1991, Slack filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody in the United States District Court for the District of Nevada. In his first federal petition Slack raised the following issues: there was insufficient evidence adduced at trial to convict him of Second Degree Murder; the trial court improperly allowed evidence of a sexual relationship between Slack and the twelve-year-old victim; the reasonable doubt instruction given at his trial violated the due process clause of the United States and Nevada constitutions; and the trial court erred by not adequately defining premeditation in the

. . .

jury instructions regarding murder. (App. 5.) On February 19, 1992, Slack's first federal habeas petition was dismissed without prejudice so that he could exhaust his state remedies. (App. 7.)

On July 10, 1992, Slack filed a state petition for writ of habeas corpus (post-conviction) in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. In his petition Slack claimed as Ground One that he was denied the effective assistance of counsel during pre-trial and trial proceedings, because his counsel: 1) failed to find out what kind of deal was made with Kamal Bey;[1] 2) failed to file a pre-trial motion in limine to stop the introduction of prior sexual relations with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey because as his deal was based on his trial testimony; 4) failed to interview Slack's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice testimony instruction; 7) failed to have presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey; and 8) these alleged errors prejudiced him.

As Ground Two, Slack claimed that he had ineffective assistance of counsel on his direct appeal because his appellate counsel: 1) failed to raise a *Franklin*[2] violation on appeal; 2) failed to raise the issue that his trial counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise the issue of prosecutorial misconduct when the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon.

. . .

. . .

---

[1] Kamel Bey, alleged by Slack to be an accomplice, was charged as an accessory to murder in juvenile court. (App. 8, pg 29.)

[2] *Franklin v. State*, 94 Nev. 220, 577 P.2d 860 (1978), sets forth the requirements for testimony of an accomplice pursuant to a plea agreement.

As Ground Three, Slack claimed that the trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and the trial court improperly instructed the jury on premeditation. As Ground Four, Slack claimed that the prosecutor committed misconduct by withholding from the jury the fact that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. (App. 9.)

On February 11, 1993, the state district court denied Slack's petition for post-conviction relief. (App. 8.) Slack appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal. (App. 9.) The Nevada Supreme Court found that Slack's claims were repelled by the record. Specifically, the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Nevada Supreme Court found that Slack's theory of the case was that he accidentally shot the victim and noted that Slack testified that his finger was on the trigger when the gun fired. Therefore, it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an accomplice nor a co-defendant and Slack was not prejudiced by the lack of an accomplice testimony instruction. The Nevada Supreme Court also noted that the remaining claims were similarly repelled by the record. *Id.*

Slack returned to federal court in March, 1995, and filed his second Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of Nevada. After various procedural motions, Slack was appointed counsel and filed a third amended petition for writ of habeas corpus. In his third amended petition Slack alleged the following grounds: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did

not properly plead each element of first degree murder which failed to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; 5) Petitioner was denied effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; 6) Petitioner was denied effective assistance of appellate counsel in violation of the Sixth Amendment; 7) The doctrine of cumulative error mandates relief. (App. 15.)

Respondents, alleging that Slack's petition contained unexhausted grounds and constituted an abuse of the writ under Rule 9(b) of the Rules Governing §2254 Cases in the United States District Courts, moved to dismiss Slack's third amended petition. (App. 16.) The federal district court ordered Slack to attempt to demonstrate cause and prejudice to overcome the abuse of the writ bar that applied to grounds two, four(c), five, six, and seven of his third amended petition. (App. 18.) Rather than attempt to show cause and prejudice, Slack filed a motion for reconsideration of the federal district court's order. (App. 19.) The federal district court denied Slack's motion for reconsideration and dismissed, with prejudice, grounds two, four(c), five, six and seven of his third amended petition as abusive. The federal district court also found that Slack's claim in ground three was unexhausted and, based on *Rose v. Lundy*, 455 U.S. 509 (1982), dismissed his federal action. (App.1.)

On May 19, 1998, the federal district court denied Slack's request for a certificate of probable cause to appeal. (App. 22.) On July 7, 1998, the United States Court of Appeals for the Ninth Circuit also denied Slack's request for a certificate of probable cause. (App. 2.)

. . .

. . .

. . .

IV.

REASONS FOR DENYING THE WRIT

A. Introduction.

Review on a writ of certiorari is not a matter of right, but of judicial discretion which will be granted only for compelling reasons. Sup. Ct. R. 10. In considering whether to grant certiorari pursuant to Sup. Ct. R. 10, while neither controlling or fully measuring this Court's decretion, this Court may consider whether: (a) the Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted an usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power; or (b) whether the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

Slack requests this Court grant certiorari, vacate the judgment below and remand for further proceedings to allow the Ninth Circuit to consider this Court's decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). In the alternative, Slack requests this Court grant his petition for review to resolve an alleged split of authority among the United States courts of appeals regarding whether the provisions of Rule 9(b), governing second and successive petitions, is properly invoked when the prior federal habeas petition was not decided on the merits. As will be shown below, *Stewart v. Martinez-Villareal, supra*, does not apply to the facts of this case and there is no split of authority among the United States courts of appeals which would warrant this Court's consideration.

B. This Court Should not Grant the Petition, Vacate the Judgment and Remand for Further Proceedings because *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), does not apply to the facts of this case.

The federal district court dismissed most of Slack's claims as an abuse of the writ relying on this Court's decision in *McCleskey v. Zant*, 499 U.S. 467 (1991) and the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). Slack now argues that this Court's decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), has abrogated *Farmer*. Therefore, Slack, has asked this Court to issue an order granting his petition, vacating the judgment below and remanding for further proceedings (hereinafter GVR order).

This Court has stated that a GVR order is potentially appropriate in the following limited circumstances:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence v. Chater, 516 U.S. 163, 167 (1996).

In this case, this Court's decision in *Stewart* has no application to the facts of *Farmer*. Therefore, there is no reason for this Court to remand for further proceedings. In *Farmer*, the Ninth Circuit determined that the abuse of the writ analysis under Rule 9(b) applies to new claims raised in a subsequent petition whether or not the first petition was determined on the merits. In *Stewart*, this Court decided whether Martinez-Villareal's claims brought under the authority of *Ford v. Wainwright*, 477 U.S. 399 (1986), were subject to the restrictions on "second or successive" applications for federal habeas relief found in the newly revised 28 U.S.C.§2244 (Supp. 1997), the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA). *Stewart* at 1619. Slack initiated his action in the federal district court prior to the effective date of AEDPA. *Stewart* involves the interpretation of a statute that is not applicable to this case. Therefore, *Stewart* has no applicability to this case.

In addition, the result in *Stewart* turned on the nature of the claim involved, that is, that Martinez-Villareal was incompetent to be executed. The claim was not ripe for consideration in the first habeas action filed in federal court, although the claim was raised in his initial federal petition. In *Stewart*, this Court stated:

> Later, in *Rose v. Lundy*, 455 U.S. 509, 522, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

Stewart at 1622.

In this case, Slack's first federal petition was dismissed in order for him to exhaust state remedies. Slack returned to state court and raised the claims he failed to exhaust in his first federal petition. Slack then returned to federal court and filed a successive petition raising brand new unexhausted grounds. It was Slack's new, unexhausted grounds which the federal district court properly found constituted an abuse of the writ pursuant to Rule 9(b).

The facts of this case are materially different from the facts of the *Stewart* case. This Court's opinion in *Stewart* simply does not apply to Slack's case. Therefore, there is not a reasonable probability that the Ninth Circuit would reconsider the district court's decision. Therefore, a GVR order is not appropriate and should not be issued by this Court.

C. There is no Split of Authority among the United States Courts of Appeals regarding whether the Provisions of Rule 9(b) Governing "Second or Successive" Petitions Applies when the Prior Petition was not Determined on the Merits.

Slack also argues that this Court should grant review because the Ninth Circuit's decision in this case and in *Farmer* have created a split in authority among the circuits as to whether Rule . . .

9(b) applies to a successive petition when the prior petition was not decided on the merits. There is no such split of authority.

Slack first cites *Dellenbach v. Hanks*, 76 F.3d 820 (7th Cir. 1996). However, *Dellenbach*, involved an analysis under former 28 U.S.C. §2244(a) and (b) in a case where the district court had summarily dismissed the habeas petition. The Seventh Circuit's analysis turned on the express language of former 28 U.S.C. §2244(a) and did not even mention Rule 9(b). Slack next cites *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990), however, abuse of the writ is not mentioned anywhere in the Eighth Circuit's opinion.

Slack also points to the Fifth Circuit's decision in *Woods v. Whitley*, 933 F.3d 321 (5th Cir. 1991). Woods involved an abuse of the writ analysis regarding the petitioner's third federal habeas petition. Woods first federal petition was dismissed for failure to exhaust and his second was decided on the merits. *Woods* at 322. Although it is unclear from the decision it appears that Woods returned to federal court with fully exhausted claims in his second petition. Woods third petition was denied as an abuse of the writ. *Woods* at 324-325. Not one of these cases is on point with this case. Slack's first federal petition was dismissed to exhaust state remedies and then, rather than exhausting all of his claims, Slack returned to federal court with brand new unexhausted grounds which had never been presented anywhere (not even state court) before.

Slack also lists the following cases in support of his argument that there is a split in the circuits: *In re Wilson*, 142 F.3d 939 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573 (10th Cir. 1997); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997); *Christy v. Horn*, 115 F.3d 201 (3rd Cir. 1997); *Benton v. Washington*, 106 F.3d 162 (7th Cir. 1996); *In re Turner*, 101 F.3d 1323 (9th Cir. 1997); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44 (2nd Cir. 1996). These cases do not contain an abuse of the writ analysis. In every one of these cases the court was analyzing 28 U.S.C. §2244, as amended by AEDPA, to determine whether a petitioner must request permission from the circuit court before filing a second petition

in federal district court, when the first petition was dismissed without prejudice. AEDPA does not apply to Mr. Slack's case. In fact, former 28 U.S.C. §2244 is not at issue in Slack's case. These cases do not support Slack's argument that the Ninth Circuit's decision in his case and in *Farmer* has created a split among the circuit courts.

There is no split among the circuit courts. Therefore, Slack has not presented any reason to justify this Court's granting of plenary review.

V.

CONCLUSION

For the foregoing reasons, this Court should not grant Slack's petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 10th day of December, 1998.

FRANKIE SUE DEL PAPA
Attorney General

David F. Sarnowski

DAVID F. SARNOWSKI *
Chief Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3538

Counsel for Respondents
* Attorney of Record

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO T. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, Ely (Nevada) State Prison and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, Respondents.	Case No. 98-6322 **CERTIFICATE OF SERVICE**

I, DAVID F. SARNOWSKI, one of the attorneys for the Respondents in the above-entitled proceeding, E. K. MC DANIEL and FRANKIE SUE DEL PAPA, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 10th day of December, 1998, I caused to have copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI mailed as noted below in duly addressed envelopes, with first-class postage prepaid, to each person below. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

RECEIVED
DEC 14 1998
OFFICE OE THE CLERK
SUPREME COURT, U.S.

WILLIAM K. SUTER, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
[An original plus 10 copies]

FRANNY A. FORSMAN
Federal Public Defender
TIMOTHY P. O'TOOLE
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
[2 copies]

David F. Sarnowski

DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538
Attorney for Respondents